AMANAH SAHAM PAHANG BHD.

v.

MARAN ROAD SAWMILL SDN. BHD. & ORS.

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 227 OF 1983]
17 NOVEMBER 1983

CIVIL PROCEDURE: *Ex parte injunction - Application to set aside - Application for stay of proceedings - For proceedings to be struck out - Arbitration clause - Whether applicable - Onus of proof - Section 6 Arbitration Act - Fraud - Whether allegation true - Conditions governing stay of proceedings - Whether fulfilled.*

The plaintiffs, a public company, and the defendants No. 2 to 5 entered into a joint venture agreement in May 1978. The 1st defendant was a private company of which the defendants were shareholders. In July 1983, the plaintiffs obtained an interim injunction against all the defendants to restrain them from continuing with their activities under the agreement, on the ground of gross mismanagement and failure to maintain proper internal control of the 1st defendant. The defendants applied to have the injunction set aside and later applied in addition for a stay of proceedings and alternatively for the proceedings to be struck out. It was agreed that the Court should deal first with the defendants' application for stay of proceedings as a decision on that would also operate on the injunction. The contention of the defendants was the reliefs sought by the plaintiffs should not be the subject of Court proceedings because they were covered by an arbitration clause (Clause 11) in the joint venture agreement.

Held:

[1] In view of s. 6 of the Arbitration Act 1950, the onus was on the plaintiffs to show why stay should not be granted.

[2] Section 25(2) of the Arbitration Act was not applicable. What was alleged as fraud on the part of the defendants were violations of ss. 131 and 133 of the Companies Act, 1965, and would not give rise to any civil cause of action. In any case, fraud was not pleaded in the statement of claim.

[3] There was not sufficient reason shown by the plaintiffs why the matter should not be referred to arbitration.

(a) There was a valid and subsisting arbitration agreement covering the dispute. Clause 11 did provide for arbitration to be a condition precedent to Court proceedings. The expression "settle" in Clause 11 must on the true construction of the clause, necessarily mean that the parties could resort to Court proceedings only after arbitration had failed to settle the dispute between the parties. There was neither vagueness nor ambiguity in Clause 11.

(b) Defendants 2 to 5 were entitled to rely on the agreement. The arbitration clause applied to the 1st defendant too, though it was not a party to the joint venture agreement, as it came into existence by virtue of that agreement and could not exist without it.

(c) No proceedings other than entry of appearance and the application for stay of proceedings had been taken by the defendants.

(d) The defendants were ready and willing to arbitrate.

[Application allowed. Parties directed to refer their dispute to arbitration.]

Legislation referred to:
Arbitration Act 1952, ss. 6, 25(2)
Companies Act 1965, ss. 131, 133

For the plaintiffs - Dr. Llyod Fernando; M/s. Zain & Co.
For the 2nd to 5th defendants - Davidson (R.R. Sethu with him; M/s. Azman, Davidson & Co.

JUDGMENT

Shaik Daud Ismail J:

On 16 July 1983 Amanah Saham Pahang Bhd. (ASPA) filed an *ex-parte* application for an interim injunction against all the 6 defendants. This application was heard on 22 July 1983 and this Court granted the injunction asked for. The injunction among other things, directed the defendants by themselves, their servants or agents or otherwise whosoever to forthwith cease felling timber in the Concession Area in the forest districts of Jerantut and Kuantan; the 2nd defendant to forthwith restrain from functioning the exercising any of his powers, rights and privileges as managing director or director or deputy chairman of the 1st defendant; and the 6th defendant from exercising control or management of the 1st defendant. The order also directed that the defendants be at liberty to apply to set aside the said order within a period of 14 days.

Accordingly, by a summons-in-chambers dated 6 August 1983 the defendants No. 2 to 5 sought to apply to have the *ex parte* injunction set aside. However, by another summons-in-chambers dated 2 September 1983 defendants No. 2 to 5 sought to amend the summons-in-chambers of 6 August 1983 by adding two new clauses, one seeking a stay of proceedings and alternatively to have the proceedings struck out.

On 7 September 1983 when both matters came up for hearing Mr. Davidson who appeared with Mr. R.R. Sethu for the 2nd to 5th defendants stated that the 6th defendant in fact is one and the same person as the 5th defendant. To this, Counsel for plaintiffs, Dr. Lloyd Fernando, conceded. As the summons-in-chambers dated 2 September 1983 had been duly served on the other party I proceeded to deal with it first and after hearing a short argument by both parties, granted defendants No. 2 to 5 leave to amend their summons-in-chambers dated 6 August, 1983.

At the outset it was mutually agreed that the Court would deal first with the defendants' application for stay of proceedings as a decision on this would also operate on the injunction.

First and foremost I will set out relationship between the plaintiffs and the defendants. The plaintiffs are a public company wholly owned by the Pahang State Government. The 1st defendants are a private company with 2nd, 3rd, 4th and 5th defendants as shareholders. By an agreement dated 5 May 1978 the Government of the State of Pahang granted to the plaintiffs a concession area of 90,000 acres in the forest districts of Jerantut and Kuantan for a purpose of felling and logging timber therein. Before that on 2 May 1978 the plaintiffs entered into a joint venture agreement with the 2nd, 3rd, 4th and 5th defendants whereby in consideration of the plaintiffs agreeing to assign the timber concession to the 1st defendant, defendants 2 to 5 would transfer to the plaintiffs 51% of the issued and paid-up shareholding of the 1st defendant. Pursuant to the joint venture agreement the assignment of the timber concession and the transfer of 51% shares took place on 10 May 1978.

It is the contention of the plaintiffs that the 2nd, 3rd, 4th and 5th defendants in breach of the joint venture agreement, have grossly mismanaged; failed to maintain proper internal control of accounting system of the 1st defendant company.

As a result of this gross mismanagement the Pahang State Government by a letter dated 8 July, 1983 revoked the concession agreement granted to the plaintiffs. Consequently by letters dated 9 July 1983 and 13 July 1983 the plaintiffs gave notice to all the defendants of the revocation. It was subsequent to this that the plaintiffs sought the *ex-parte* injunction against the defendants.

It is the contention of Mr. Davidson on behalf of the 2nd, 3rd, 4th and 5th defendants that the relief sought by the plaintiffs falls under 2 heads namely (1) complaints of breach of joint venture agreement and (2) complaints relating to internal management. Mr. Davidson contends that both the relief sought for should not be the subject of Court proceedings. In other words, they should not be brought to Court because they are covered by an arbitration clause in the joint venture agreement. Clause 11 of the joint venture agreement is referred to (see Exhibit AN3 in encl. 3). Now Clause 11 provides as follows:

> All questions or differences whatsoever which may at any time hereafter arise between the parties hereto touching this Agreement or the subject matter thereof or arising out of or in relation thereto respectively, and whether as to construction or otherwise shall be referred to a single arbitrator in case the parties can agree upon one, otherwise to three arbitrators, one to be appointed by each party to the difference and the third to be appointed by the two so appointed in accordance with and subject to the provisions of the Arbitration Ordinance 1950 or any statutory modification or re-enactment thereof for the time being in force. Provided and notwithstanding the foregoing any party shall be entitled to institute court proceedings, in the event that the questions or differences as a aforesaid shall not be settled within six (6) months from the date any such question or difference shall first arise and communicated in writing to the other party or parties.

Mr. Davidson contends further that most of the relief sought for clearly comes within the terms of the arbitration clause in the joint venture agreement and the rest deals with internal affairs of the joint venture company. All these should go to arbitration to give a chance to the parties to solve. Dr. Fernando on behalf of the plaintiffs contends that under Clause 11 arbitration is not a condition precedent to Court proceedings, otherwise it would be so provided. As such, he contends that there is vagueness in the agreement and Clause 11 does not apply but rather Clause 13.3 would apply. Clause 13.3 states as follows:

> In entering into this Agreement, the parties recognise that it is impracticable to make provision for every contingency that may arise in the course of performance thereof, and, accordingly, the parties hereby declare it their intention that this Agreement shall operate among them with fairness and without detriment to the interest of any of them, and if in the course of performance of this Agreement unfairness to any party is disclosed or anticipated, then the parties shall use their best endeavours to agree upon such action as may be necessary and equitable to remove the cause or causes of the same.

He further contends that the expression "settled" in Clause 11 does not necessarily mean arbitration.

Let me pause at this stage to consider the effect of Clause 11. Section 6 of the Arbitration Act 1950 (Revised 1972) confers on the Court on the application of any party to an arbitration agreement, the discretion to stay proceedings provided it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. In view of this provision the onus then is on the plaintiffs to show why stay should not be granted. In seeking to discharge this onus the plaintiffs raised the followings points namely:

(i) arbitration is not a condition precedent;

(ii) the expression "settled" does no mean arbitration;

(iii) there is vagueness in Clause 11;

(iv) by virtue of s. 25(2) of the Arbitration Act 1950 since there was fraud arbitration does not apply; and

(v) 1st defendant not a party to the joint venture agreement.

Let me now deal with these points one by one. As for (1) it is true that Clause 11 does not say in so many words that arbitration is a condition precedent but the provision of Clause 11 is clear and unambiguous. I am of the view that the provision of Clause 11 affords the parties the chance first and foremost to go for arbitration when disputes arise and if the disputes cannot be settled 6 months after they arise, then they are to resort to Court proceedings. This provision in no way ousts the jurisdiction of the Court and it merely affords the parties to resort to arbitration when disputes arise and I am of the view that the 6 months period given is merely to restrict the period for the parties to resolve by arbitration, otherwise such disputes may be dragged on indefinitely in arbitration. In a way Clause 11 does provide for arbitration to be a condition precedent to Court proceedings although it did not say so in so many words.

As for (ii) it is contended that the expression "settled" does not necessarily mean arbitration and on this he contends that if there is a dispute and if this dispute is not settled within 6 months the parties could straightaway institute Court proceedings. In view of the clear and unambiguous provisions of Clause 11, I fail to see how this argument can be accepted. To accept this argument would mean that there can be no resort at all to arbitration and if that is so then the first part of cl. 11 would be redundant and of no value. Why then have such a provision when it is not to be adhered to. To accept that argument then Clause 11, I feel, would not have been so worded as it is but a simpler and shorter clause to the effect that if parties fail to resolve any disputes within 6 months then Court proceedings are to be instituted. I am of the view that since the expression "settled" in Clause 11 comes after the provisions providing for reference to arbitration it must, on the true construction of the clause, necessarily mean that after reference to arbitration 6 months after the dispute arises, there is no settlement, the parties could resort to Court proceedings.

As for (iii) I see neither vagueness nor any ambiguity in Clause 11. It is plain to me what Clause 11 seeks to achieve and that is for parties to resort to arbitration first before coming to Court.

As for (iv) the plaintiffs contend that there was fraud on the part of the 2nd, 3rd, 4th and 5th defendants and as such by virtue of s. 25(2) of the Arbitration Act 1950 the Court ought not to order stay. It would appear that the fraud alleged are the alleged offences under ss. 131 and 133 of the Companies Act 1965. With due respect, these alleged offences are offences under the Companies Act and can in no way be termed fraud. I am of the view that there are neither a fraud on the joint venture agreement nor on the 1st defendant company but are, if proved, violations of the Companies Act and neither of these alleged offences can give rise to a civil cause of action by one of the partners of the joint venture company. In any case fraud was never pleaded in the statement of claim by the plaintiffs.

Lastly, as for (v) plaintiffs contends that since 1st defendant is not a party to the joint venture agreement the arbitration clause does not apply to the 1st defendant. While it is true that the 1st defendant is not a party to the joint venture agreement, but the 1st defendant company

came into existence in its present structure by virtue of the joint venture agreement. Whatever happens to the joint venture agreement directly affects the 1st defendant company. The 1st defendant company in its present structure stands or falls on the existence of the joint venture agreement. In other words, the 1st defendant company in its present structure cannot subsist without the joint venture agreement. Any agreement which the shareholders reach will be binding on the 1st defendant company as they constitute the shareholders of the 1st defendant company.

In order that a stay may be granted five conditions must be fulfilled (see *Halsbury's* 4th Edn. Vol. 2 para. 560). The five conditions are:

1. There should be a valid and subsisting arbitration agreement covering the dispute.
2. The applicant must be entitled to rely on the agreement.
3. No steps to be taken after appearance.
4. Applicant ready and willing to arbitrate.
5. No sufficient reason for refusing stay.

As for the 1st condition, as I mentioned earlier, I hold that there is subsisting a valid arbitration clause in the joint venture agreement in Clause 11 thereof covering the dispute. This in fact has never been disputed by the plaintiffs but what plaintiffs are saying is that the arbitration clause cannot be applied for reasons given.

As for the 2nd condition, the application was made by the defendant 2 to 5 who are parties to the joint venture agreement which contained the arbitration clause. In this case all the four defendants being sued were parties to the agreement and all of them are entitled to rely on the agreement. The agreement is subsisting.

On the 3rd condition none of the applicants in this case took any other proceedings other than enter appearance. No defence has yet been filed and no other proceedings taken. The only action taken is this application for stay to refer the dispute to arbitration.

On the 4th condition the applicants in their affidavit confirmed that they are ready and willing to refer the dispute to arbitration as provided by Clause 11 of the joint venture agreement. I am satisfied that the applicants are ready and willing to arbitrate and there is nowhere contended otherwise.

Finally I am satisfied for the reasons mentioned earlier that there is no sufficient reason shown by or on behalf of the plaintiffs why the matter should not be referred in accordance with the arbitration clause as provided by the agreement.

I am satisfied that all the five conditions stated above exist in this application for stay and reference to arbitration.

In the event I allow the application and direct that the parties do refer their dispute to arbitration in accordance with cl. 11 of the joint venture agreement.

Also found at [1984] 1 CLJ 242